FILED

03 427 SEP 17 2003

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

JEANNE WOODFORD, Warden, California State Prison at San Quentin, *Petitioner,*

v.

COLLEEN MARY ROHAN ex rel. OSCAR GATES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Considering the limited purpose of federal habeas corpus proceedings, and Congress's policy of deference to state-court determinations, does the statutory right to capital habeas counsel under 21 U.S.C. § 848(q)(4)(B) entitle a petitioner to an indeterminate stay of habeas proceedings because of his present mental incompetence, when his claims were fully exhausted in state court and there has been no factual determination that his present ability to communicate with counsel is essential to present those claims in federal court?

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PETITION FOR WRIT OF CERTIORARI

Jeanne Woodford, Warden, California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals for the Ninth Circuit, App. A, is reported at 334 F.3d 803 (9th Cir. 2003). The order of the district court denying a stay of capital habeas corpus proceedings and certifying the issue for interlocutory appeal is unreported. App. B.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 25, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

21 U.S.C. § 848(q)(4)(B) provides:

> In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

STATEMENT OF THE CASE

In 1979, Oscar Gates ("Gates") committed a murder during a robbery, by shooting two family members, one fatally, at their home in Oakland, California. Evidence presented at the penalty phase included prior convictions for robbery, rape, and kidnaping, as well as an assault, robbery, and killing in Los Angeles for which Gates was later convicted. Defense evidence at the penalty phase showed that Gates was "good-natured" and, according to a psychologist, "well adjusted." Gates was sentenced to death. App. A at 3. The judgment was affirmed on direct appeal. *People v. Gates*, 43 Cal. 3d 1168 (1987). After his conviction and sentencing, Gates began acting uncooperatively and irrationally, eventually filing more than a

hundred habeas petitions and asserting bizarre claims. App. A at 3.

In 1988, Gates sought federal habeas corpus relief. The district court appointed counsel in 1989 pursuant to 21 U.S.C. § 848(q)(4)(B), which authorizes the appointment of counsel for a prisoner challenging a death penalty judgment on federal habeas corpus. Since 1990, Gates's mental competence has been litigated in federal court. App. B at 33-34. In 1994, the district court found Gates mentally incompetent and appointed Respondent, Colleen Rohan ("Rohan"), an attorney, to serve as Gates's "next friend" for federal habeas proceedings and "to act for Mr. Gates and make appropriate decisions on his behalf[.]" App. B at 36. Rohan filed an amended federal petition with unexhausted claims in 1995. It led to a return to the California Supreme Court, which denied habeas relief in 2000, and the filing of a second amended habeas corpus petition in the federal district court. In that federal habeas petition, Rohan sought to stay federal habeas proceedings because Gates was mentally incompetent. App. B at 34-35. In 2001, the district court refused to stay proceedings, concluding:

> [P]etitioner's argument . . . appears to reflect an attempt to import trial-level constitutional safeguards – such as, the right to effective assistance of counsel and competency to stand trial – into federal habeas proceedings. The role of federal habeas review is not to re-try the original trial, however, but instead is limited to review for federal constitutional error . . . . Ordinarily, the best evidence of any constitutional error at trial will be the trial record itself. Thus, given the more limited review of federal habeas, and the fact that resolution of many claims will not necessitate any input from the inmate, there is no justification for staying federal habeas proceedings in their entirety simply because the inmate cannot

> communicate with federal habeas counsel and possibly provide information that might strengthen some of the claims in the petition or give rise to other claims. [¶] The Court invited a submission from petitioner setting forth the claims where Mr. Gates's input would be material and describing the type of information Mr. Gates might be available to provide. On August 6, 2001, petitioner submitted such information. Without revealing the content of that submission, it can be described as fairly general. Accordingly, at the present time, and on the present record, the Court finds that a stay of these proceedings is not warranted.

App. B at 46-47. The district court certified the issue for interlocutory review under 28 U.S.C. § 1292(b). App. B at 51-52.

The Ninth Circuit Court of Appeals accepted jurisdiction and, on June 25, 2002, reversed on the ground that petitioner's inability to rationally communicate with his attorney deprived him of his right to assistance of counsel under 21 U.S.C. § 848(q)(4)(B). The court held that "where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally, refusing to stay proceedings pending restoration of competence denies him his statutory right to assistance of counsel, whether or not counsel can identify with precision the information sought." App. A at 26-27. The panel found that result "dictate[d]" by *Calderon v. U.S. Dist. Court* (*Kelly*), 163 F.3d 530 (9th Cir. 1998) (en banc), *overruled in unrelated part by Woodford v. Garceau*, __ U.S. __, 123 S.Ct. 1398, 155 L. Ed. 2d 363 (2003). App. A at 29-30. In *Kelly*, the Ninth Circuit ruled a condemned prisoner's mental incompetence tolled the federal habeas corpus statute of limitations because a petitioner's statutory right to counsel depends on his ability to communicate rationally, and

if mental incompetence prevents rational communication then his statutory right to counsel would be "eviscerate[d]," and effectively denied. App. A at 18-19, *citing Kelly*, 163 F.3d at 541.

The Ninth Circuit concluded that if Gates is incompetent and habeas proceedings are not stayed, he would be unable to rationally communicate any "private knowledge" to counsel to support or corroborate existing claims. App. A at 26. The panel also noted an inability to disclose information could affect "an entirely new claim," given the statutory limitations on second or successive petitions, 28 U.S.C. § 2244(b)(2), which might prevent habeas counsel's use of that information in a future, second petition. App. A at 16. For its holding that a stay was required, the panel looked to this Court's per curiam decision in *Rees v. Payton*, 384 U.S. 312, 314-15 (1966) (*Rees I*), and the subsequent summary order in *Rees v. Payton*, 386 U.S. 989 (1967) (*Rees II*), staying habeas proceedings in a capital case in which a condemned habeas petitioner had sought to withdraw a certiorari petition against the advice of his attorneys. App. A at 20-21.

In deciding to stay proceedings, the court of appeals rejected the district court's conclusion that Gates's counsel needed to offer more than a "fairly general" submission about the areas requiring Gates's rational participation. App. A at 24. The Ninth Circuit ruled: "Requiring counsel to identify with particularity what petitioner would tell them were he competent, rather than merely the general areas where he could potentially assist, sets an unrealistically high bar under the circumstances." App. A at 24-25.

REASONS FOR GRANTING CERTIORARII.

CERTIORARI IS REQUIRED TO MAKE CLEAR THAT FEDERAL HABEAS CORPUS PROCEEDINGS CANNOT BE DELAYED BECAUSE OF THE HABEAS PETITIONER'S PRESENT MENTAL INCAPACITY, WITHOUT A DETERMINATION THAT PETITIONER'S APPOINTED COUNSEL CANNOT PRESENT THE EXHAUSTED CLAIMS FROM THE EVIDENCE AND MATERIALS DEVELOPED AND PRESENTED IN THE STATE COURTS

Oscar Gates, who is acting through a next friend, has been found by the district court to be unable to communicate rationally with his appointed attorney in this capital federal habeas corpus proceeding. No factual determinations were ever made that Gates's mental incompetence impairs the presentation of exhausted federal habeas claims or that his current ability to communicate with his attorney is essential to present those claims. Indeed, the district court found to the contrary. App. A at 5-6.

Nevertheless, the Ninth Circuit ordered the federal habeas proceedings stayed during Gates's incompetency, suspending indefinitely a presumptively valid state conviction for murder and sentence of death. The court's ruling threatens to freeze similar federal habeas proceedings everywhere in the Ninth Circuit, in every case where the habeas petitioner is presently unable to communicate with counsel — without regard to the fact that the petitioner's claims have already been fully exhausted in state court post-conviction proceedings, and without any evidentiary determination that the current appointed counsel is unable to present those same claims based on the

investigation, evidence, and other materials that were developed in the state-court proceedings. The decision creates confusion about the scope of federal habeas corpus, suggesting it acts as a forum for the discovery and development of information not previously known or presented to the state courts. Finally, the decision creates another stage of capital federal habeas corpus litigation: a mental competency determination on whether to stay proceedings, regardless of whether petitioner's competency is in fact necessary to resolve pending, exhausted claims. The court of appeal's decision thus undermines this Court's admonition that federal habeas is not "a means by which a defendant is entitled to delay an execution indefinitely." *Barefoot v. Estelle,* 463 U.S. 880, 887 (1983).

Accordingly, this Court should provide guidance about the effect of a capital petitioner's mental incompetence on the scope and function of federal habeas review.[1/]

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1. The federal habeas corpus petition in this case was filed before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, §§ 104, 110 Stat. 1218. Although the terms of the AEDPA do not govern this case, its objectives "inform" this Court's review. *See Calderon v. Thompson*, 523 U.S. at 554, 558 (regardless whether statute governs, court of appeals must exercise its discretion "in a manner consistent with" the AEDPA's objectives; AEDPA's provisions "'certainly inform our consideration'" of whether appellate court abused its discretion) (quoting *Felker v. Turpin*, 518 U.S. 651, 663 (1996)).

A. The Ninth Circuit's Ruling Permits Unreasonable Delay of Federal Habeas Corpus Proceedings Under the Guise of a Statutory Right to Competent Representation That Falsely Assumes Communication Needs of Appointed Counsel in Federal Proceedings Are Equivalent to Those of Trial Counsel or of Counsel in State Post-conviction Proceedings

The Ninth Circuit unreasonably equated the kind of communication needed by appointed counsel under 21 U.S.C. § 848(q)(4)(B) with the kind of communication needed by trial counsel or by counsel in state post-conviction proceedings. The appellate court thus created a standard of "competence" for the assistance of federal habeas counsel that is measured according to the needs of trial counsel or state post-conviction counsel to investigate and develop evidence. That standard finds no justification in the limited purpose of federal habeas corpus proceedings.

Acknowledging that there is no Sixth Amendment right to assistance of counsel in federal habeas corpus proceedings, "effective or otherwise," App. A at 12, the court of appeals nevertheless concluded that considerations of due process favor *inferring* a right to competent assistance of capital habeas counsel from Congress's creation of the statutory right to counsel in 21 U.S.C. § 848(q)(4)(B). App. A at 17. The court determined that, as a matter of law, the assistance of counsel in federal habeas corpus proceedings cannot be said to be "competent" or "meaningful" unless the petitioner and his attorney can engage in rational communication:

> [I]f meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to meaningful assistance of counsel, it follows that

> Congress' mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent.

App. A at 17.

But the reasoning is unsound, given the court's false premise that the "capacity for rational communication is *essential* to meaningful assistance of counsel" in federal habeas proceedings. Unlike a trial, federal habeas corpus proceedings are limited to consideration only of claims that have already been presented and exhausted in state-court post-conviction proceedings. *Rose v. Lundy*, 455 U.S. 509 (1982). Accordingly, in the absence of proof that counsel appointed under 21 U.S.C. § 848(q)(4)(B) cannot meaningfully present fully exhausted claims — despite the availability of all of the evidence, arguments, and materials developed during the state-court appeal and post-conviction proceedings — it cannot be said as a matter of law that the habeas petitioner's present capacity for rational communication is *essential* to meaningful assistance of counsel in federal habeas corpus proceedings.

The court of appeals reached a contrary position based on its own circuit law, which holds that a capital petitioner's mental incapacity to rationally communicate with habeas counsel tolls the habeas corpus statute of limitations because, absent tolling, his statutory right to counsel would be denied. App. A at 18-19 (citing *Kelly V*, 163 F.3d at 541). The underlying premise is that without the ability to rationally communicate with counsel, regardless of any factual determination about the subject matter or the need for the communication, petitioner would be deprived of the effective assistance of counsel to which he is entitled. *See* App. A at 9 (citing *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996)).

Congress, however, implicitly rejected so broad a view by precluding ineffective assistance of habeas counsel as a basis for

delaying enforcement of a state capital judgment. Under 28 U.S.C. § 2261(e): "The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in *a capital case* shall not be ground for relief in a proceeding arising under section 2254." (Emphasis added.) Whereas counsel's ineffectiveness at trial is a basis of relief under the Sixth Amendment, *see United States v. Cronic*, 466 U.S. 648, 658 (1984); *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984), Congress barred relief for ineffective assistance in federal capital habeas proceedings. Congress clearly did so to prevent having habeas counsel's performance used to undermine the finality of the state judgment. Indefinitely suspending a death judgment, as the Ninth Circuit has done in this case, solely because the petitioner could not rationally communicate with counsel during habeas proceedings, regardless of whether a communication might be essential to present his exhausted claims, undermines finality no less.

This is not to say that Congress expressed an indifference to ineffective assistance of counsel. It imposed standards of professional experience to qualify an attorney for appointment as capital habeas counsel. 21 U.S.C. § 848(q)(5)-(7). Insofar as either the district court, the petitioner, or petitioner's appointed next friend is dissatisfied with counsel's performance, different counsel can be appointed "at any phase of the State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel." 28 U.S.C. § 2261(e). Those statutory provisions provide the sole remedy for ineffectiveness during federal habeas proceedings. *See also* 28 U.S.C. § 2254(i) (no ineffective assistance of collateral counsel claims available in non-capital federal habeas proceedings).

Accordingly, it is assumed that counsel is qualified and is effectively representing petitioner; and if there is dissatisfaction with counsel's performance, the sole remedy is replacement. Given the need for finality, and the limited, secondary nature of

the proceedings, such safeguards are sufficient to create a conclusive presumption of effective assistance in federal habeas proceedings. Congress did not intend the scope of representation to be what is expected at trial – that is, the communication and development of speculative "private information" from a defendant. Because federal habeas corpus proceedings are limited to review of exhausted claims based on the record made in the state courts, the duties of appointed counsel under 21 U.S.C. § 848(q)(4)(B) are more like those of appellate counsel than trial counsel. Congress recognized this important distinction in describing the qualifications of appointed habeas counsel: "If the appointment is made *after judgment*, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and *must have had not less than three years experience in the handling of appeals in that court in felony cases*." 21 U.S.C. § 848(q)(4)(B) (emphasis added).[2/]

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2. In contrast, consistent with the primary function of state courts as the forum in which to develop evidence, California rules and practice provide that a condemned prisoner is entitled to appointment of habeas corpus counsel "to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus." California Supreme Court Policies Regarding Cases Arising From Judgments of Death, 1-1. These state post-conviction proceedings are the vehicle by which the prisoner, represented by counsel, brings forth any newly discovered evidence casting fundamental doubt on the accuracy or reliability of the proceedings leading to his conviction. *See In re Clark*, 5 Cal. 4th 750, 766, 855 P.2d 720, 21 Cal.Rptr. 509 (1993).

B. The Ninth Circuit's Ruling Undermines the Proper Relationship Between State and Federal Courts in Reviewing State Convictions for Constitutional Infirmity

By threatening unreasonably to delay presumptively valid state judgments, the court's decision undermines core principles of finality, comity, and federalism. *See Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) ("Finality is essential to both the retributive and the deterrent functions of criminal law . . . . [T]he power of a State to pass laws means little if the State cannot enforce them") (internal quotation marks and citations omitted); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) ("The state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings"). The Ninth Circuit's refusal to distinguish between the role of trial counsel and the role of counsel in state post-conviction proceedings, on the one hand, and the role of counsel in federal habeas corpus proceedings, on the other, fosters continuing disregard for the limited nature of federal habeas review of state convictions.

Indeed, to justify its stay of proceedings here, the court of appeals baldly suggested that new, previously undisclosed evidence might later be introduced *for the first time* to support a claim of ineffective assistance of trial counsel. App. A at 26 (suggesting that when Gates regains his competence, he may disclose to counsel "private knowledge" concerning his mental capacity during trial and the competence of his trial counsel).

The "scope of the right to counsel" is defined by "a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson v. Illinois*,

487 U.S. 285, 288 (1988). The ultimate question in determining the role of counsel is what purpose can "a lawyer serve at the particular stage of the proceedings in question[.]" *Id.* A capital habeas petitioner does not need, and is not entitled to, the same type of representation accorded a presumptively innocent criminal defendant who must defend against charges which require his ability to rationally consult with his attorney. Federal habeas corpus is not a device to raise new factual claims or, for the first time, substantial facts supporting old claims. See *O'Sullivan v. Boerkel*, 526 U.S. 838, 844 (1999) (state court is first forum to review claims and provide relief); *Keeney v. Tamayo-Reyes*, 504 U.S. at 9-10; *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 275-77 (1971); *compare Vasquez v. Hillery*, 474 U.S. 254, 260-61 (1986). Certiorari is warranted, therefore, to preserve the carefully crafted allocation of state-federal responsibilities from erosion under the guise of a need to ensure trial-type representation by counsel appointed under 21 U.S.C. § 848(q)(4)(B).

Ignoring core principles of comity and finality, the Ninth Circuit instead looked to the evolution of common law over the past three centuries in protecting a mentally incapacitated prisoner from execution. Particularly important in its analysis was the development of modern-day collateral proceedings as explained by Justice Powell in his concurrence in *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring). App. A at 10-13.

In that concurrence, Justice Powell formulated the test for determining competence of a prisoner to be executed. *Ford v. Wainwright* at 422. As later adopted by this Court, the execution standard requires only the prisoner's awareness of the punishment to be suffered and why he is suffering it. That standard for execution is lower than the trial standard, which requires an ability to consult with counsel with a reasonable degree of rational understanding, along with a rational and

factual understanding of the proceedings. *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989). Justice Powell explained that the execution standard should be lower because, historically, the condemned prisoner needed the ability to rationally communicate up to the last minute to prevent unjust execution, but as the legal process evolved, a prisoner received "more extensive review of convictions and sentences" than at common law, "including not only direct appeal but ordinarily both state and federal collateral review," with the "right to *effective* assistance of counsel at trial and on appeal . . . . It is thus unlikely indeed that a defendant today could go to his death with knowledge of undisclosed trial error that might set him free." *Ford v. Wainwright*, 477 U.S. at 420 (Powell, J., concurring; emphasis in original).

The Ninth Circuit misinterpreted Justice Powell's words to mean that the process as it has evolved requires a condemned prisoner to rationally communicate, apparently without limitation, in collateral proceedings for the same reasons the common law had required rational communication before the prisoner could be executed in the Eighteenth Century. App. A at 13. ("Indeed, Justice Powell specifically relied on the efficacy of collateral review among the reasons to discard the common law rational communication requirement at execution. . . . If anything, *Ford* reinforces the importance of competence to pursue collateral review because it removes common law safeguards at later stages of the process"). Justice Powell actually stated the opposite. He explained that in past times the execution occurred relatively soon after trial, and a defendant who was unable to communicate at execution was also likely to have been incompetent to stand trial. Because a defendant "must be competent to stand trial, . . . the notion that a defendant must be able to assist in his defense is largely provided for [at trial]." *Ford* at 421 (Powell, J., concurring). Accordingly, "a standard that focused on the defendant's ability to assist in his defense [in a collateral proceeding] would give

too little weight to the State's interest in finality, since it implies a constitutional right to raise new challenges to one's criminal conviction until sentence has run its course. Such an implication is false . . . ." *Id.* at 420-21, and n. 2.

C. The Ninth Circuit's Ruling Rests in Part on an Unwarranted Interpretation of this Court's Summary Order in *Rees v. Payton*

The Ninth Circuit found "persuasive" support in this Court's summary order in *Rees v. Payton*, 386 U.S. 989 (1967) (*Rees II*) for its conclusion that capital habeas corpus proceedings must be stayed where the condemned prisoner is found to be mentally incompetent. App. A at 21. The *Rees II* order[3] followed upon this Court's decision and remand in *Rees v. Payton*, 384 U.S. 312 (1966) (*Rees I*).

As a summary order, *Rees II* has dubious precedential value for any rule of law. *Cf. Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974). It is also factually distinguishable. This Court's earlier reasoned opinion in *Rees I* did not address the question presented below of whether a "next friend" and attorney can competently prosecute federal relief on behalf of a mentally incompetent condemned prisoner when the prisoner chooses to seek such relief. Rees never had a "next friend," as there is here, who would have had standing to pursue the certiorari

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3. The order states as follows: "This case is held without action on the petition until further order of the Court." *Rees II* at 989. In 1995, this Court issued a final order dismissing Rees's petition for writ of certiorari. *Rees v. Superintendent of Virginia State Penitentiary*, 516 U.S. 802 (1995). By that time, the death judgment had been void for 23 years in light of *Furman v. Georgia*, 408 U.S. 238 (1972), and Rees himself was already dead. App. A at 21 n. 8.

petition on behalf of a mentally incompetent prisoner. Years later, in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), this Court looked to *Rees I* for the test that a next friend must meet for standing to act on behalf of a condemned prisoner. In the death penalty post-judgment context, the Court ruled that under the standards of *Rees I*, a next friend could be appointed by showing that the condemned prisoner was suffering from a mental disease, disorder or defect that substantially affected his capacity to make an intelligent decision. *Whitmore* at 165-66. That test was met here in appointing Rohan as the next friend to pursue habeas proceedings on behalf of the mentally incompetent Gates. The court of appeals, however, using the summary order in *Rees II*, has turned *Rees I* on its head by finding that habeas proceedings cannot go forward because Gates is incompetent, thereby using the reason why a next friend was appointed to go forward as the reason to stay habeas proceedings.

In sum, the Ninth Circuit's decision freezes indefinitely presumptively valid state death penalty judgments whenever a condemned prisoner is found mentally incompetent in federal court proceedings, whether or not the petitioner's mental incapacity impairs the presentation of pending, exhausted claims. Ignored in the Ninth Circuit's decision are the purpose and function of state law and procedure, through trial, appeal, and post-judgment habeas review. Yet, absent the district court's factual determination that the petitioner's ability to rationally communicate with habeas counsel is essential to present exhausted federal claims, a stay of federal habeas proceedings adds nothing to the adequacy or purpose of federal habeas review. The Ninth Circuit's novel imposition of an unlimited mental competency requirement for federal habeas relief gravely undermines comity and finality. It is essential for this Court to intervene and provide the federal habeas courts with clear direction on this important question.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Dated: September 17, 2003

Respectfully submitted,

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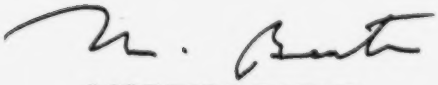

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Supreme Court, U.S.
FILED

(2) No. 03 427 SEP 17 2003

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-99016

COLLEEN MARY ROHAN ex rel. OSCAR GATES, *Petitioner-Appellant,*

v.

JEANNE WOODFORD, Warden, California State Prison at San Quentin, *Respondent-Appellee.*

OPINION

D.C. No. CV-88-02779 WHA

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, District Judge, Presiding

Argued and Submitted,
September 10, 2002 – San Francisco, California

Filed June 25, 2003

Before: Alex Kozinski and Andrew J. Kleinfield, Circuit Judges
and Lawrence K. Karlton, District Judge

Opinion by Judge Kozinski

COUNSEL

William L. Osterhoudt, San Francisco, California, argued for the appellant. Tim Brosnan joined him on the briefs.

John H. Deist, Deputy Attorney General, San Francisco, California, argued for the appellee. Bill Lockyer, Robert R.Anderson, Ronald A. Bass and Dane R. Gillette joined him on the brief.

OPINION

KOZINSKI, Circuit Judge:

We decide whether a district court must stay capital habeas proceedings during a petitioner's incompetence.

1.

Oscar Gates was sentenced to death for murdering Lonnie Stevenson in 1979. Gates belonged to a forgery ring run by the Stevenson family, and became embroiled in a dispute over his cut of the proceeds during which a Stevenson family member shot him in the leg. Gates then went to the Stevensons' house with a gun and met two family members, Lonnie and Maurice, in the yard. Gates killed Lonnie and wounded Maurice. Maurice claims Gates ordered them to hand over their jewelry and then shot them both. Gates claims he fired only after another family member showed up wielding a gun.

The State charged Gates with murder, robbery and other offenses. The jury convicted on all counts and found the special circumstance of murder in connection with a robbery, making Gates eligible for the death penalty. During the penalty phase, the State introduced evidence of Gates's prior convictions for robbery, rape and kidnaping. It also presented evidence of a prior assault and robbery of two women that had resulted in one's death, a crime for which Gates was later convicted. The defense responded with evidence of Gates's upbringing, alleging that he

had been a victim of police harassment and racism. Gates's neighbors testified he was a "good-natured person," and a clinical psychologist characterized him as well-adjusted. After considering this evidence, the jury sentenced Gates to death. The California Supreme Court affirmed the conviction and sentence on direct review in 1987. *People v. Gates*, 43 Cal. 3d 1168, 240 Cal.Rptr. 666, 743 P.2d 301 (1987).

Since his conviction, Gates has been acting uncooperatively and irrationally. He has filed an extraordinary number of pro se habeas petitions in various courts—more than 120 by 1993 alone, some hundreds of pages long. The petitions are rambling and make outlandish claims. They revolve primarily around Gates's theory that he is a beneficiary of the Howard Hughes trust fund, and that state officials and his appointed defense counsel are conspiring to "assassinate" him in order to deny him his inheritance. The petitions often lapse into even more fanciful claims—that prison medical staff are trying to poison him with radioactive cobalt, or that Howard Hughes told him how to cure AIDS with yellow chili peppers. Gates's counsel believe he is delusional and suffers from a psychological condition known as "hypergraphia." The State, however, suspects Gates is fully capable of acting rationally and is malingering to avoid the death penalty.

Gates's counsel sought habeas relief in state and federal court. They believe his conviction and death sentence violated the Constitution in several respects, including: (1) Gates was incompetent to stand trial, and his trial counsel were ineffective for failing to seek a competency hearing; (2) Gates's speedy trial rights were violated, and evidence was lost as a result; (3) the State failed to disclose bargains it reached with prosecution witnesses; (4) the jury instructions misstated the murder/robbery aggravating circumstance; (5) Gates's lawyers were ineffective for presenting inadequate mitigating evidence of his upbringing; (6) the penalty-phase jury instructions misstated the procedure for considering mitigating circumstances; and (7) California's death penalty is unconstitutional because it does not sufficiently narrow the class of death-eligible defendants. Counsel also argue that Gates is currently incompetent and that further habeas proceedings must be

stayed until he can communicate rationally. They say their ability to pursue many of Gates's claims is impaired by their inability to converse with him, and that proceeding while Gates is incompetent would undermine his constitutional due process rights and his statutory right to capital habeas counsel under 21 U.S.C. § 848(q)(4)(B).

Gates exhausted his claims before the state courts, including a claim that he was incompetent to pursue state collateral review. No state competency hearing was held. His competence was then litigated in federal court for the next several years. He was transferred to the California Department of Mental Health, where he was examined over two months by a state psychiatrist and a psychiatrist retained by Gates's counsel. Both concluded that Gates is not malingering, and truly does have a mental impairment. The state psychiatrist reported that Gates "suffer[s] from a mental disease or defect" that "markedly interferes with a *rational* understanding" of the proceedings, and that he is "quite unable to make rational decisions." In response to the question whether Gates's condition "[r]ender[s] him unable, as opposed to unwilling, to assist his counselor in the preparation of his petition for writ of habeas corpus," the psychiatrist wrote, "His unwillingness stems from his paranoid lack of trust and certainty he is being persecuted. His attorneys have attested to his inability to cooperate."

Gates's own expert reached similar conclusions. In response to the question whether Gates had "the capacity to appreciate his position and make rational choices with regard to the current proceedings in this Court," he answered "definitely in the negative." "He is unable to cooperate with his attorneys and he is unable to be rational about the Court . . . . He is unable to make rational decisions with respect to the proceedings in the Court. . . . I do not think he can cooperate with any attorney."

The district court held a competency hearing in which it reviewed the two experts' findings and interviewed Gates in camera. It concluded:

> Gates' mental condition would seriously impede his attorneys from protecting his rights. . . . Mr. Gates [is] presently incompetent, in that he presently suffers from a mental disorder that may substantially affect his capacity to cooperate with counsel and proceed with his petition in this court. This disorder denies Mr. Gates the capacity to appreciate his position and to make rational choices with respect to these habeas proceedings.[1]

After making these determinations, however, the court did not stay further proceedings as requested. Instead, it appointed Colleen Rohan, an attorney, to pursue Gates's petition as "next friend" on his behalf.

Rohan soon reported that she, too, was unable to pursue Gates's habeas claims effectively because she could not communicate rationally with him. She renewed the request to stay further proceedings. The State took the position that adjudication of Gates's petition should proceed despite his incompetence. The district court told Rohan to file a brief under seal identifying the claims requiring Gates's assistance and describing the information sought. Rohan submitted the sealed brief. The district court reviewed it and then denied the request to stay proceedings.

The district court held that neither due process nor the federal habeas statutes required a stay, because Rohan's appointment as next friend adequately protected Gates's interests. It acknowledged that due process requires a criminal defendant to be competent to stand trial. In its view, however, that requirement did not apply to habeas proceedings, which are a mere "secondary and limited" component of the criminal justice process, *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). The court observed that federal statutory law and Supreme Court precedent both assume that next friends can pursue habeas claims on an incompetent prisoner's behalf. *See* 28 U.S.C. § 2242 ("Application for a writ of habeas corpus shall be in writing signed

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1. The district court's order is sealed. We quote from it to the extent necessary to render our discussion intelligible.

and verified by the person for whose relief it is intended *or by someone acting in his behalf.*" (emphasis added)); *Whitmore v. Arkansas*, 495 U.S. 149, 162, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (noting that next friend standing "has long been an accepted basis for jurisdiction").

The court acknowledged that, in some cases, a competent petitioner could "provide information that might strengthen some of the claims in the petition or give rise to other claims." But it held that this was not such a case: "Without revealing the content of [the sealed brief], it can be described as being fairly general. Accordingly, at the present time, and on the present record, the Court finds that a stay of these proceedings is not warranted."

Acknowledging that the issue was close and that judicial economy favored immediate resolution, the court certified its ruling for interlocutory review under 28 U.S.C. § 1292(b), and we accepted jurisdiction. We must assume for purposes of this appeal that Gates's incompetence is bona fide; we address only its consequences.[2]

2.

1. Our constitutional and statutory interpretations are shaped by common law tradition. We therefore begin, as other courts have before us, by reviewing the pedigree of the right that Rohan invokes on Gates's behalf.

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2. There is some ambiguity in the district court's findings. It found that Gates "presently suffers from a mental disorder that *may* substantially affect his capacity to cooperate with counsel and proceed with his petition in this court." (Emphasis added.) The State, however, does not dispute the district court's determination of incompetence in this appeal. We therefore proceed on the assumption that Gates is incompetent—in other words, that he is unable to communicate rationally with counsel.

The right to competence was firmly established at common law. Sir Matthew Hale, Lord Chief Justice of the King's Bench, noted in his *Pleas of the Crown* that the common law prohibited trial and execution of incompetents:

> [I]f [a] person after his plea, and before his trial, become of non sane memory, he shall not be tried; or, if after his trial he become of non sane memory, he shall not receive judgment; or, if after judgment he become of non sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution.

1 Sir Matthew Hale, *The History of the Pleas of the Crown* 35 (Prof'l Books Ltd. 1971) (1736) (pre-1676 manuscript). Sir John Hawles, Solicitor-General under William III, articulated a similar standard:

> [N]othing is more certain law, than that a person who falls mad after a crime supposed to be committed, shall not be tried for it; and if he falls mad after judgment he shall not be executed. . . . [T]he true reason of the law I think to be this, a person of "non sana memoria," and a lunatick during his lunacy, is by an act of God . . . disabled to make his just defence. There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence . . . .

Sir John Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1719), *reprinted in* 11 State Trials 473, 476 (T.B. Howell ed., 1811). And Blackstone repeated this standard in his *Commentaries*:

> [I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he

> has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.

4 William Blackstone, *Commentaries* *24-25 (1769); *see also id.* at *389 ("[T]he law knows not but he might have offered some reason, if in his senses, to have stayed [the] proceedings.").

Hale, Hawles and Blackstone all tied competence to capacity for rational communication. Competence allowed a defendant to "make his defence" and a condemned to "allege[ ] something in stay of judgment or execution." *Id.* at *24-25; *cf.* 1 Hale at 35. It precluded "circumstances lying in [the condemned's] private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence." Hawles at 476. Competence was more than just the ability to understand what was going on—it was the capacity to communicate exonerating information to others.

The right to competence, moreover, did not expire with the return of the jury's verdict. It persisted through entry of judgment and to execution. *See* 4 Blackstone at *24-25; 1 Hale at 35. Then, as now, trial was the pivotal truth-seeking event, but the right to competence was so fundamental that it persisted beyond trial, for the prisoner may yet "allege[ ] something in stay of judgment or execution." 4 Blackstone at *24-25. Next friends and guardians who could act on an incompetent's behalf were familiar at common law. *See* 1 *id.* at *448- 54. But the authorities give no hint that the Crown could avoid the competence requirement by appointing a next friend to "allege[ ] something in stay of judgment or execution" on an incompetent's behalf. Quite the contrary; the rule applied even when others stood ready to "take upon

them his defence." *See* Hawles at 476.

Though well-settled at common law, the right to competence has met with a mixed constitutional reception. The Supreme Court has recognized a due process right to competence during the trial itself. *See Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); *Medina v. California*, 505 U.S. 437, 453, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992); *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *cf. Spain v. Rushen*, 883 F.2d 712, 722, 728 (9th Cir. 1989) (finding a constitutional violation where severe and prolonged shackling impaired the defendant's mental faculties and ability to communicate with counsel). A criminal defendant must have " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him.' " *Cooper*, 517 U.S. at 354, 116 S.Ct. 1373 (quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam)). The rationale for the requirement has shifted somewhat: Capacity for rational communication once mattered because it meant the ability to defend oneself, *see Faretta v. California*, 422 U.S. 806, 823-26, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263 (1978), while it now means the ability to assist counsel in one's defense, *see Cooper*, 517 U.S. at 354, 116 S. Ct. 1373. But whatever the rationale for the requirement, capacity to communicate remains a cornerstone of due process at trial.

The right to competence *after* trial, now addressed almost exclusively in the context of competence to be executed, has taken a different course. States have long barred execution of the insane, but the constitutional scope of that right remains unsettled. In early decisions, the Court held that due process did not require states to assign a condemned's insanity claim to a jury, *see Nobles v. Georgia*, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515 (1897), or even to a judicial officer, *see Solesbee v. Balkcom*, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950). Those decisions addressed the manner of ascertaining competence rather

than whether it was required. In *Solesbee*, however, Justice Frankfurter reached the question in a separate opinion, writing:

> [T]he practical considerations are not less relevant today than they were when urged by Sir John Hawles and Hale and Hawkins and Blackstone in writings which nurtured so many founders of the Republic. If a man has gone insane, is he still himself? Is he still the man who was convicted? In any event "were he of sound memory, he might allege somewhat" to save himself from doom. It is not an idle fancy that one under sentence of death ought not, by becoming *non compos*, be denied the means to "allege somewhat" that might free him. Such an opportunity may save life, as the last minute applications to this Court from time to time and not always without success amply attest.

Id. at 19-20 (Frankfurter, J., dissenting); *see also id.* at 20 n.3, 70 S.Ct. 457 (quoting state decisions requiring "intelligence requisite to convey [exonerating] information to [one's] attorneys or the court").

The Court confronted the question directly in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), albeit through the Eighth Amendment's ban on cruel and unusual punishment rather than the Due Process Clause. A plurality concluded that the Eighth Amendment bars execution of the insane without settling on a definition of the term. *Id.* at 406-10, 106 S.Ct. 2595. Justice Powell wrote separately. He noted that Hale and Blackstone had tied competence to be executed to capacity for rational communication but, in his view, this justification had "slight merit today" in light of the "far more extensive review of convictions and sentences" available through direct appeal and state and federal collateral review. *Id.* at 419-20, 106 S.Ct. 2595 (Powell, J., concurring). "It is . . . unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." *Id.* at 420, 106 S.Ct. 2595. He thus found "no sound basis for constitutionalizing the broader definition of insanity, with its requirement that the defendant be able to assist in his own defense," *id.*

at 422 n.3, 106 S.Ct. 2595, and adopted instead a narrower definition that barred execution "only of those who are unaware of the punishment they are about to suffer and why they are to suffer it," *id.* at 422, 106 S.Ct. 2595. Although Justice Powell spoke only for himself, both the Supreme Court and our own court have since referred to his standard with apparent approval, *see Penry v. Lynaugh*, 492 U.S. 302, 333, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1195 n.1 (9th Cir. 2001) (per curiam), and other circuits have explicitly adopted it, *see, e.g.*, *Rector v. Clark*, 923 F.2d 570, 572-73 (8th Cir. 1991).[3]

2. We confront a question that falls somewhere between these two lines of authority: not competence to stand trial or competence to be executed, but competence to pursue collateral review of a state

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3. Some jurisdictions, however, do incorporate the common law requirement of capacity for rational communication. *See, e.g.*, Miss. Code Ann. § 99-19-57(2)(b); *Fisher v. State*, 845 P.2d 1272, 1276 n.3 (Okla. Crim. App. 1992); *In re Smith*, 176 P. 819, 823-24 (N.M. 1918); *see also ABA Criminal Justice Mental Health Standards* std. 7-5.6 & cmt., at 290-93 & n.7 (1989). The Supreme Court has also recently held that execution of the mentally retarded violates the Eighth Amendment, relying on, inter alia, the fact that "[m]entally retarded defendants may be less able to give meaningful assistance to their counsel." *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 2252, 153 L.Ed.2d 335 (2002); *see also id.* at 2267 (Scalia, J., dissenting) (arguing that the issue should be analyzed under the Due Process Clause). Incompetence and mental retardation are overlapping but distinct categories. Many retarded individuals are still competent to stand trial. *See id.* at 2250 (majority opinion). A mental defect, however, must manifest itself by age 18 in order to satisfy the clinical (and apparently constitutional) definition of retardation. *Id.*

conviction in federal court. Must a district court stay habeas proceedings when a petitioner cannot assist counsel because he is incapable of rational communication?

This is an issue the Supreme Court precedents do not conclusively resolve. The constitutional requirement of competence to stand trial certainly does not imply a coordinate requirement on collateral review. As the State reminds us, habeas is a "secondary and limited" component of the criminal justice process, *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), where many of the defendant's rights no longer attach. There is, for example, no constitutional right to counsel on habeas, *Murray v. Giarratano*, 492 U.S. 1, 10, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (plurality opinion); *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), effective or otherwise, *see Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993). And, subject to possible Suspension Clause constraints, *see Felker v. Turpin*, 518 U.S. 651, 663-64, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), there is no due process right to collateral review at all, *see United States v. MacCollom*, 426 U.S. 317, 323, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976) (plurality opinion).

On the other hand, Justice Powell's *Ford* opinion does not *preclude* such a requirement. Competence to pursue collateral relief on a first federal petition was not at issue there; Ford did not claim incompetence until *after* his state and federal petitions were denied—a fact relied on by both Justice Powell and the four Justices in dissent. *See Ford*, 477 U.S. at 420 n.1, 106 S.Ct. 2595 (Powell, J., concurring) ("Only after all of these challenges had been resolved against him did petitioner challenge his impending execution on the ground of insanity."); *id.* at 434-35, 106 S.Ct. 2595 (Rehnquist, J., dissenting) (characterizing the case as a "post-collateral-attack challenge to a State's effort to carry out a lawfully imposed sentence").[4] Indeed, Justice Powell specifically relied on the

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4. Ford apparently did not even begin to lose competence until after his first federal petition was filed. The decision reports that Ford first "began to manifest gradual

efficacy of collateral review among the reasons to discard the common law rational communication requirement at execution. *See id.* at 420 & n.1, 106 S.Ct. 2595 (Powell, J., concurring). When collateral review is compromised by the petitioner's incompetence, however, this justification fails. *Cf. Rector* v. *Bryant*, 501 U.S. 1239, 1242 n.2, 111 S.Ct. 2872, 115 L.Ed.2d 1038 (1991) (Marshall, J., dissenting from denial of certiorari).[5] If anything, *Ford* reinforces the importance of competence to pursue collateral review because it removes common law safeguards at later stages of the process.

Any attempt to appreciate the relevance of the common law rational communication requirement today must also come to grips with the fact that collateral review—and judicial oversight in general—have subsumed many of the functions formerly performed by executive clemency at the time of execution:

> For centuries governors commuted death sentences in significant numbers. That pattern continued for the first two-thirds of the twentieth century. Florida commuted nearly a

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changes in behavior" in "early 1982." *Ford*, 477 U.S. at 402, 106 S.Ct. 2595. Ford's federal petition appears to have been filed at the end of 1981 or very early in 1982. Compare *Ford* v. *State*, 407 So. 2d 907 (Fla. 1981) (December 4, 1981, denial of state postconviction relief), *with Ford* v. *Strickland*, 676 F.2d 434 (11th Cir. 1982) (April 15, 1982, panel opinion affirming district court's denial of federal habeas relief), *vacated*, 696 F.2d 804 (11th Cir. 1983) (en banc). In any case, the important point is that Ford did not claim he was incompetent until later.

5. Justice Marshall gave this as a reason to reject Justice Powell's position, but we see it as entirely consistent. *Ford* addressed competence to be executed, not competence to pursue collateral review.

> quarter of its death sentences between 1924 and 1966; North Carolina commuted more than a third between 1909 and 1954. Those figures dropped close to zero under the new sentencing schemes. In 1987, for example, there were 299 death sentences in the United States and only 5 commutations; in 1988 there were 296 death sentences and only 4 commutations. Clemency was once a regular part of the capital sentencing process, but once the process was constitutionalized clemency became a freak occurrence. . . . [M]any of the kinds of cases that had once been suitable for clemency were now being handled by the courts instead. Judges, not governors, now decided whether trials had been conducted fairly, so when considering applications for clemency governors tended to defer to the courts that resolved the defendant's constitutional claims. . . . Where the sentence had been affirmed as constitutional at all stages of judicial review, . . . the assumption within governors' offices tended to be that the sentence ought not to be disturbed, an assumption very different from the one that had prevailed for the preceding several centuries, when the executive branch was supposed to exercise its independent judgment as to the propriety of an execution.

Stuart Banner, *The Death Penalty: An American History* 291-92 (2002) (footnote omitted). *But see* Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. Times, Jan. 12, 2003, § 1, at 1. The ability to "allege[ ] something in stay of judgment or execution," 4 Blackstone at *24-25, now has far more practical significance in postconviction proceedings than at the moment of execution. From that perspective, *Ford* can be seen not as removing common law protections, but merely as refocusing them where they now matter.

One might counter that prisoners unhappy with the habeas process can simply decline to invoke it. Collateral review is, perhaps, "voluntary" in a sense that trial and execution are not; the government does not compel anyone to pursue relief. But "one may be a voluntary

party only because there is no other means of protecting legal rights." *Bittaker v. Woodford*, No. 02-99000, slip op. 7635, 7652 (9th Cir. June 6, 2003) (en banc) (internal quotation marks omitted). No one would defend an inadequate trial by pointing out that the unhappy defendant could have pled guilty if he didn't like it. The price of foregoing habeas review is leaving potential constitutional claims unredressed.

One might also suggest that a petitioner suffers no prejudice if forced to proceed while incompetent because he can always raise claims in a successive petition once he regains competence. This argument, too, falls short. Federal law imposes strict limits on successive petitions. 28 U.S.C. § 2244 provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> . . . .
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244. A prisoner who cannot convey relevant information to his counsel for his first petition thus faces formidable obstacles if he later regains competence and tries to file a second. The information may tend to prove a claim counsel already presented unsuccessfully. In that case, subsection (b)(1) categorically bars relief: It applies whenever "the basic thrust or gravamen of the legal claim is the same," even if the

petitioner offers "new factual grounds in support." *Babbitt* v. *Woodford*, 177 F.3d 744, 746 (9th Cir. 1999) (internal quotation marks omitted). If the information relates to an entirely new claim, the petitioner may not be totally out of luck, but he must still overcome subsection (b)(2)(B)(ii)'s enhanced "clear and convincing evidence" standard.

More importantly, successive petitions are not particularly helpful to a prisoner executed before he ever regains competence. Under Justice Powell's *Ford* standard, the state can carry out a death sentence so long as the prisoner understands the nature and purpose of the punishment, even if he lacks capacity to communicate exonerating information. The Attorney General has made quite clear in this case that the State intends to do exactly that: Gates will be executed whether or not he ever regains the ability to communicate rationally. Compelling a prisoner to pursue federal review while incompetent may thus prevent him from *ever* being able to bring claims based on his private knowledge.[6]

3. Congress has not explicitly required competence in federal habeas proceedings, but the common law tradition underlying the right to competence and its great practical significance in this context inform our interpretation of the statutes Congress has enacted. *Cf. Beck v. Prupis*, 529 U.S. 494, 500-01, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000). In capital cases, prisoners challenging their convictions or sentences in federal court have a right to assistance of counsel. *See* 21 U.S.C. § 848(q)(4)(B). This prescription reflects Congress's belief that "federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty," *McFarland*

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6. This issue could be addressed in a challenge to the execution itself once that claim becomes ripe. *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 630 (9th Cir. 1997), *aff'd*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998). But where the gravamen of a prospective competence-to-be-executed claim is the failure to have afforded meaningful habeas review, the issue is also appropriately considered during the habeas proceedings.

v. Scott, 512 U.S. 849, 859, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994), and that meaningful assistance of counsel is essential to secure federal constitutional rights. Counsel's assistance, however, depends in substantial measure on the petitioner's ability to communicate with him. And if meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to meaningful assistance of counsel, it follows that Congress's mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent.

Implying a right to competence from a right to counsel breaks no new ground. It is an inference courts have drawn in many different contexts. The Supreme Court, for example, often grounds the constitutional competence-to-stand-trial requirement in the Sixth Amendment right to counsel. *See Cooper*, 517 U.S. at 354, 116 S.Ct. 1373 (" 'Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel . . . .' " (quoting *Riggins v. Nevada*, 504 U.S. 127, 139-40, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (Kennedy, J., concurring in the judgment))). Likewise, both federal and state courts—in decisions we analyze at greater length below—have implied a right to competence from statutory rights to counsel. *See Calderon v. U.S. Dist. Court* (*Kelly V*), 163 F.3d 530, 541 (9th Cir. 1998) (en banc) ("[The] statutory right to counsel . . . contemplates effective communication between lawyer and client."); *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1998) ("Unless a death-row inmate is able to assist counsel by relaying [pertinent] information, the right to collateral counsel . . . would be practically meaningless."); *People v. Owens*, 564 N.E.2d 1184, 1189-90 (Ill. 1990). *But see Ex parte Mines*, 26 S.W.3d 910, 911-12 (Tex. Crim. App. 2000).

Our construction also respects the principle that statutes should be interpreted to avoid substantial constitutional questions. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). Although Rohan cites no case squarely recognizing her due process claim, it is far from

insubstantial. Having provided for collateral review of state sentences, Congress must supply procedures that comport with due process. *Bonin*, 999 F.2d at 429; *cf. Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998) (narrowest-grounds opinion of O'Connor, J.) (holding that the Due Process Clause applies even to clemency proceedings). The firmly entrenched common law right to competence persisting beyond trial is a strong indicator of a constitutional due process right. *Cf. Cooper*, 517 U.S. at 356, 116 S.Ct. 1373. To be sure, Blackstone never singled out a right to competence in *habeas* proceedings. That's not surprising; the English Habeas Corpus Act specifically excluded challenges to convictions by a court of competent jurisdiction. *See Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-03, 7 L.Ed. 650 (1830). But Blackstone's exhaustive recitation of the stages at which the right attached—arraignment, trial, judgment and execution— might reasonably be read to suggest a continuing right, one that attaches to all significant phases of the criminal justice process, whatever they may happen to be. This reading is particularly compelling when new stages of that process are invoked to justify stripping common law protections from others to which the right indisputably *did* attach.

Rohan's due process claim is debatable, but it raises constitutional questions substantial enough that we should avoid them if possible. By reasonably construing 21 U.S.C. § 848(q)(4)(B) to incorporate a statutory right to competence, we leave them for another day.

4. Our own case law all but dictates the result here. In *Calderon v. U.S. District Court* (*Kelly V*), 163 F.3d 530 (9th Cir. 1998) (en banc), *overruled in unrelated part by Woodford v. Garceau*, _U.S._, 123 S. Ct. 1398, 155 L.Ed.2d 363 (2003), we held that a prisoner's incompetence is grounds for equitably tolling AEDPA's one-year statute of limitations for filing habeas petitions: Kelly's alleged mental incompetency also justifies equitable tolling, at least until a reasonable period of time has elapsed after the district court makes a competency determination. The record discloses that Kelly has been having serious mental problems for many years. In fact, the State agreed that a hearing was necessary to determine his present competency. Under 21 U.S.C. § 848(q)(4)(B),

Kelly has a statutory right to counsel in his federal habeas proceeding. That right contemplates effective communication between lawyer and client. A putative habeas petitioner's mental incompetency—a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control—renders the petitioner unable to assist his attorney in the preparation of a habeas petition. Such a condition could eviscerate the statutory right to counsel. Where, as here, there is a threshold showing of mental incompetency, a sufficient showing has been made for equitably tolling the statute of limitations, and we reject *Kelly III*'s holding to the contrary. When a putative habeas petitioner's mental competency is at issue, and the record discloses a genuine basis for concern, it is appropriate to toll the AEDPA's time bar until a reasonable period after the district court makes a competency determination. *Kelly V*, 163 F.3d at 541 (citations omitted).

The district court thought *Kelly V* inapplicable because it addressed equitable tolling rather than a stay. But we are bound by *Kelly V*'s rationale for decision as well as its specific result. *See, e.g., Omohundro v. United States*, 300 F.3d 1065 (9th Cir. 2002) (reevaluating prior circuit precedent in light of the reasoning of an intervening decision from a higher authority). *Kelly V* held that a prisoner's incompetence justifies equitable tolling because it could "eviscerate the statutory right to counsel." 163 F.3d at 541. If a petitioner's statutory rights depend on his ability to communicate rationally, compelling him to pursue relief while incompetent is no less an infringement than dismissing his late petition. Either way, his statutory right to counsel is denied.

That Gates is represented by a next friend does not distinguish *Kelly V*. Kelly was also represented by a next friend at all relevant times. *See Calderon* v. *U.S. Dist. Court* (*Kelly III*), 127 F.3d 782, 783, 786 (9th Cir. 1997). If appointment of a next friend did not start Kelly's AEDPA clock running, it is no basis for denying Rohan's claim.

We rejected claims similar to Rohan's in two decisions preceding *Kelly V*. *See Kelly III*, 127 F.3d at 786-87; *Wade v. Calderon*, 29 F.3d 1312, 1326 n.11 (9th Cir. 1994). These decisions, however, do not

survive *Kelly V*. A case may be undermined by intervening en banc or Supreme Court authority even though the issues are not identical, so long as the intervening decision has undercut the reasoning behind the prior precedent. *See Omohundro*, 300 F.3d at 1067. *Kelly V*'s holding that incompetence "eviscerate[s] the statutory right to counsel" is not compatible with our prior holdings that proceedings need not be stayed despite it.

We see no principled way to avoid applying *Kelly V*'s rationale to this case. That decision all but compels our holding that the district court's failure to stay proceedings violated Gates's statutory rights.

What little Supreme Court authority exists on this point also supports our conclusion. In *Rees v. Peyton* (*Rees I*), 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966) (per curiam), the Court ordered a competency determination after a habeas petitioner sought to withdraw his petition for certiorari. *Id.* at 314, 86 S.Ct. 1505. In a subsequent summary order, the Court stated: "This case is held without action on the petition for certiorari until further order of the Court." 386 U.S. 989, 87 S.Ct. 1310, 18 L.Ed.2d 333 (1967) (*Rees II*). The text of this order is not illuminating, but the case's unpublished record explains the Court's actions.[7]

Following *Rees I*, the district court determined that Rees was incompetent. *See* Report on Petitioner's Mental Competence at 1-2, *Rees v. Peyton*, No. 2970-M (E.D. Va. Jan. 11, 1967). Rees's counsel then asked the Court to grant certiorari but stay further proceedings, arguing that, because of his incompetence, Rees was "not in a mental condition to understand the significance of what is being done and to speak in opposition," or to make decisions regarding further pursuit of relief. *See* Memorandum Re Proper Procedure Following Judicial

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7. Rohan's motion for judicial notice of these documents is GRANTED. Fed. R. Evid. 201; *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

Finding of Petitioner's Mental Incompetence at 3-6, *Rees v. Peyton*, Misc. No. 9 (U.S. Feb. 16, 1967). The State responded that the Court should either grant certiorari and determine the petition or deny certiorari and leave Rees to claim insanity at the time of execution, but that "under no circumstances should this matter be further stayed." *See* State's Memorandum at 3, *Rees v. Peyton*, Misc. No. 9 (U.S. Mar. 14, 1967). The Court's stay evidently constitutes a rejection of the State's position.[8/]

Although the rationale implicit in *Rees II* may not be binding precedent, it is nonetheless persuasive. We obviously presume that the Supreme Court follows the law even when acting through summary orders rather than reasoned opinions. The record in *Rees II* shows that incompetence is grounds for staying habeas proceedings.[9/]

The State relies on *Whitmore v. Arkansas*, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990), but that case is not on point. *Whitmore* involved a purported next friend's attempt to file a habeas petition on behalf of a *competent* prisoner. The Court noted that next friend standing has "long been an accepted basis for jurisdiction" in habeas proceedings, *id.* at 162, 110 S.Ct. 1717, but held that it could only be invoked if the prisoner was incompetent, *id.* at 165, 110 S.Ct. 1717.

Whitmore stands for the point that a next friend *may* pursue habeas relief on an incompetent prisoner's behalf—a principle evident from the

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8. Rees's petition was dismissed many years later. *See Rees v. Superintendent of Va. State Penitentiary*, 516 U.S. 802, 116 S.Ct. 271, 133 L.Ed.2d 10 (1995). The grounds for dismissal are not stated, but Gates's counsel informs us that Rees had died.

9. Rohan also relies on *Anderson v. Kentucky*, 376 U.S. 940, 84 S.Ct. 795, 11 L.Ed.2d 766 (1964), *cert. dismissed as moot*, 515 U.S. 1155 (1995), another Supreme Court summary order staying further proceedings. That order indicates, however, that the parties agreed to it.

text of the habeas statute itself, *see* 28 U.S.C. § 2242 ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*." (emphasis added)). When grounds for relief are apparent even without the prisoner's assistance, a next friend could conclude that the prisoner's best interests would be served by pursuing relief notwithstanding his incompetence. But it does not follow that, if the next friend determines that the incompetent's best interests would *not* be served by pursuing relief, the state may nonetheless compel him to do so. "Next friends," as the name suggests, are a benefit extended to incompetents to act in their best interests and on their behalf. *See Whitmore*, 495 U.S. at 162, 110 S.Ct. 1717. That a next friend *may* pursue relief does not imply that he *must* do so.

It's difficult to see what purpose appointing a next friend even serves in this context. Where a petitioner tries to waive his claims, as in *Whitmore*, the next friend has an obvious role to fill: The prisoner's incompetence renders him unable to make decisions in his own best interests. Here, the issue is not competence to make decisions, but competence to assist counsel. The prisoner's incompetence is relevant, not because it impairs his decisionmaking, but because it prevents him from communicating information that he alone possesses. Appointing a next friend does not respond to this dimension of incompetence—particularly where, as here, the next friend is an attorney with no greater knowledge of Gates's circumstances than his counsel. No matter how faithfully Rohan may act in Gates's best interests, she cannot get inside his head any more than his counsel can.

6. Finally, our holding accords with several state decisions interpreting analogous state collateral review provisions. *See Carter v. State*, 706 So. 2d 873, 876 (Fla. 1998); *State v. Debra A.E.*, 523 N.W.2d 727, 735-36 (Wis. 1994); *People v. Owens*, 564 N.E.2d 1184, 1190 (Ill. 1990). Federal collateral review concededly presents issues of comity that state review does not. Nonetheless, the state decisions are instructive. They rely on principles of meaningful assistance of counsel that apply with equal force to the federal statutory right in 21 U.S.C. §

848(q)(4)(B). *See Carter*, 706 So. 2d at 875; *Debra A.E.*, 523 N.W.2d at 732; *Owens*, 151 Ill.Dec. 522, 564 N.E.2d at 1189-90.

Three other state decisions take a contrary position. *See Commonwealth v. Haag*, 570 Pa. 289, 809 A.2d 271, 280-81 & n.11, 282- 85 (Pa. 2002); *Ex parte Mines*, 26 S.W.3d 910, 912-16 (Tex. Crim. App. 2000); *Fisher v. State*, 845 P.2d 1272, 1275-77 (Okla. Crim. App. 1992). We find them either inapplicable or unpersuasive. *Fisher* is inapplicable because of key differences between federal and Oklahoma postconviction review. It relied largely on the premise that an incompetent petitioner could file a successive petition upon regaining competence. *Fisher*, 845 P.2d at 1277. As noted earlier, this safeguard is inapplicable at the federal level because of statutory restrictions on successive petitions and the prospect that a prisoner will be executed before he regains competence. *See* pp. 8563- 65 *supra*. Neither concern arises under Oklahoma law, which has more liberal standards for successive petitions, *see* Okla. Stat., tit. 22, § 1086 (allowing successive applications whenever "the court finds a ground for relief asserted which for sufficient reason was not asserted *or was inadequately raised* in the prior application" (emphasis added)), and a standard for competence to be executed that includes capacity for rational communication, *see Fisher*, 845 P.2d at 1276 n.3.

Haag likewise relied on the prospect of successive petitions to reject a competence requirement, and it cited *Fisher*, among other cases, in support. 809 A.2d at 280-81 & n.11. But it failed to note that Pennsylvania law differs from Oklahoma law (and resembles federal law) in both relevant respects. *See* 42 Pa. Cons. Stat. § 9543(a)(3) (restrictions on successive petitions); *Commonwealth v. Jermyn*, 539 Pa. 371, 652 A.2d 821, 823-24 (Pa. 1995) (no rational communication requirement). The court did indicate that successive petitions would not be time-barred, *see Haag*, 809 A.2d at 280 n.11, but its failure even to acknowledge these other issues diminishes its value as persuasive authority.

Mines, on the other hand, made no pretense about the efficacy of

successive petitions, and instead rejected the relevance of competence on collateral review altogether. 26 S.W.3d at 911-16. It is the only one of the six decisions to take that extreme position, and we do not find it persuasive. It pointed out that many trial rights that competence underlies —such as the constitutional right to counsel, the presumption of innocence, and the right to be present—do not apply to habeas. *Id.* at 913-14. But merely enumerating the rights a habeas petitioner does *not* enjoy doesn't address the relevance of competence to those he does.

In short, we find *Fisher* inapposite and *Haag* and *Mines* unpersuasive. We are convinced instead by *Carter*, *Debra A.E.* and *Owens*. Those decisions support our recognition of a competence requirement.

3.

Having concluded that Gates has a statutory right to competence in his federal habeas proceedings, we now consider whether the district court adequately protected it when it refused to stay those proceedings. District courts have inherent authority to stay proceedings before them, *see Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936), and statutory authority to stay underlying state proceedings when necessary to determine federal habeas claims, *see McFarland*, 512 U.S. at 857-58, 114 S.Ct. 2568. We review their decisions to grant or deny stays for abuse of discretion. *Id.* at 858, 114 S.Ct. 2568. That discretion, however, must be exercised within constitutional and statutory limits.

The district court acknowledged that a competent petitioner may sometimes "provide information that might strengthen some of the claims in the petition or give rise to other claims," but held that Gates's counsel had identified only "fairly general" areas where he might be able to assist. The district court's characterization of the contents of the sealed brief is debatable, but we do not agree in any event that the standard it applied sufficiently protected Gates's rights. Requiring counsel to identify with particularity what petitioner would tell them

were he competent, rather than merely the general areas where he could potentially assist, sets an unrealistically high bar under the circumstances.

Perhaps there are cases where an incompetent petitioner's counsel knows exactly what he needs to know but can't find out. Surely, however, those are the exception rather than the rule. Requiring an incompetent petitioner's counsel to identify precisely what the petitioner would tell him were he able seems more likely to elicit the response, "Well, if I knew that, I wouldn't have to ask!"

If a court holds an entire trial while a defendant is incompetent, we don't review for harmless error by speculating what the defendant might have said had he been able. The error is structural; it "contaminate[s] . . . the entire . . . proceeding" and "any inquiry into its effect on the outcome of the case would be purely speculative." *Satterwhite v. Texas*, 486 U.S. 249, 256-57, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); *see United States v. Klat*, 156 F.3d 1258, 1264 (D.C. Cir. 1998); *cf. Holloway v. Arkansas*, 435 U.S. 475, 489-90, 98 S.Ct. 1173, 44 L.Ed.2d 426 (1978) (complete constructive denial of counsel). Conducting an entire habeas proceeding while a petitioner is incompetent is no different. If this error would be structural and thus fatal even if the government could prove absence of prejudice post hoc, it follows a fortiori that the *petitioner* need not prove prejudice ex ante. That, however, is what the district court required.

At least some of the claims in Gates's petition could potentially benefit from his assistance. His principal contention, for example, is that he was incompetent to stand trial and that his trial counsel were constitutionally ineffective for failing to pursue a competency hearing. Like most ineffective assistance claims, this one depends in large measure on facts outside the record. *See Massaro v. United States*, _U.S._, 123 S.Ct. 1690, 1694, 155 L.Ed.2d 714 (2003). To prevail, Rohan would likely have to show Gates was incompetent at trial. If Gates were competent today, he could provide information to bolster that claim. His own testimony about his former state of incompetence, for

example, would (to the extent credited by the court) support his position. He could also direct counsel to circumstantial evidence of his incompetence at the time.

Gates's private knowledge could also be relevant to his trial counsel's deficiency in failing to pursue a competency hearing. Whether trial counsel were constitutionally ineffective may depend on their interactions with Gates. The more obvious his incompetence at the time, the more likely that they were deficient for failing to recognize it. Unless Gates can offer his side of the story, we can rely only on trial counsel's version of events.[10]

To take another example, Gates alleges that his trial counsel presented inadequate mitigating evidence during the penalty phase. Once again, if Gates were competent, he could support this claim. He is better positioned than anyone to identify aspects of his personal history that should have been, but were not, elicited. And, again, he is in a unique position to testify about the extent of his trial counsel's efforts to elicit that mitigating evidence from him.

We can only speculate what evidence Gates might offer. But that doesn't detract from the probability that *some* corroborating evidence within his private knowledge exists. By forcing Gates to proceed notwithstanding his incompetence, the trial court would effectively prevent him from ever presenting that evidence to a federal tribunal. That prospect is difficult indeed to square with "the humanity of the English law" and its recognition that, "had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." 4 Blackstone at *24-25. And it is impossible to reconcile with a congressional guarantee that "contemplates effective communication between lawyer and client." *Kelly V*, 163 F.3d at 541. Accordingly, we hold that, where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to

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10. Moreover, one of Gates's trial counsel has since died.

communicate rationally, refusing to stay proceedings pending restoration of competence denies him his statutory right to assistance of counsel, whether or not counsel can identify with precision the information sought.

The State notes that the district court's determination of competence is now nearly a decade old, and asks that we remand for a new competency determination. We leave this to the district court's discretion. If the court agrees, the relevant question will be whether Gates now has the capacity to understand his position and to communicate rationally with counsel. It goes without saying that the mere fact that Gates does not communicate rationally does not mean he is *incapable* of doing so.[11]

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11. Rohan does not seek to proceed with some claims while staying others, so we need not address the appropriate procedure in such situations. Although some state decisions have held that purely record-based or nonfactual claims should proceed notwithstanding the petitioner's incompetence, *see Carter*, 706 So. 2d at 876; *Debra A.E.*, 523 N.W.2d at 735, we see little point in *compelling* Rohan to pursue them. The State's interests are prejudiced as much by a stay of all claims as by a stay of some, as the execution cannot proceed until all claims are resolved. Because of the posture of the case, we leave several important issues open. We do not address what showing a petitioner must make to warrant a competency determination, what weight to attach to a prior state competency determination (e.g., at trial), or whether a petitioner must first "exhaust" by arguing incompetence to pursue state collateral relief in the state courts. Furthermore, while we hold that competence to pursue habeas relief encompasses some rational communication requirement, we need not decide whether the standard is the same as the standard for competence to stand trial. *Cf. Owens*, 151 Ill.Dec. 522, 564 N.E.2d at 1189-90. Finally, we do not authorize competent prisoners to delay their executions indefinitely by filing successive habeas petitions and then

CONCLUSION

Further proceedings in this case must be stayed until Gates is competent.

REVERSED AND REMANDED.

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challenging their competence to pursue those very petitions. This case involves a first federal habeas petition—what Congress intended to be the primary vehicle for vindicating federal rights—and we limit our holding accordingly.

FILED AUGUST 23, 2001
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 88-02779 WHA

DEATH PENALTY CASE

COLLEEN MARY ROHAN, ex. rel. OSCAR GATES, *Petitioner,*

v.

JEANNE WOODFORD, Warden, *Respondent.*

ORDER RE MOTION FOR SUMMARY JUDGMENT ON CLAIM 1 AND § 292 (b) CERTIFICATION

INTRODUCTION

In this capital habeas case, this order rejects petitioner's motion for a stay of all proceeding until, if ever, his mental competency is restored. This order also certifies this issue for interlocutory appeal under 28 U.S.C. 1292(b).

On June 7, 2001, respondent filed a summary judgment motion entitled "Motion For Summary Judgment (Part II)," in which she argues that Claim I in the federal petition is a pure question of law and that it lacks merit. On June 28, 2001, petitioner filed his opposition to summary judgment, which for all practical purposes is a cross-motion for summary judgment

in that it agrees Claim I is ripe for adjudication but contends Claim I has merit. On July 12, 2001, respondent filed a reply. A hearing on the motion was held on July 26, 2001.

For the reasons explained below, respondent's motion for summary judgment on Claim I is **GRANTED**. Because the issue presented in Claim I — whether Mr. Gates's current mental incompetency requires a stay of federal habeas proceedings pending restoration of his competency — involves a controlling question of law for which there is substantial ground for difference of opinion, and an immediate appeal of this order may materially advance the ultimate termination of the litigation, this order is certified for interlocutory appeal.[1/]

STATEMENT

On December 10, 1979, Maurice Stevenson and his uncle, Lonnie Stevenson, were waxing his car in front of his grandfather's house in Oakland. At about 3:30 p.m., Oscar Gates appeared, holding a gun with his grandfather's house in Oakland. At about 3:30 p.m., Oscar Gates appeared, holding a gun with the trigger cocked. Mr. Gates led Maurice and Lonnie to the side of the house and ordered them to put their hands on the wall, empty their pockets, and remove their jewelry. After Maurice and Lonnie complied with these directives, Mr. Gates frisked them and asked Maurice as to the whereabouts of Maurice's father, James Stevenson. Maurice replied that he did not know and Mr. Gates told them that he was going to kill

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1. For added clarity in discussing Claim I and the issue of Mr. Gates's mental incompetence, the instant order distinguishes between the next friend (Colleen Rohan) and federal habeas counsel, who are referred to as "petitioner," and Mr. Gates.

them. Mr. Gates first shot Lonnie, who yelled for his father and started running toward the back of the house, then shot Maurice, picked up the money and some of the jewelry, and fled. Lonnie died but Maurice survived. Some time after the shooting, Mr. Gates called Jimmy Stevenson, Maurice's grandfather, and said that he had killed Lonnie and shot Maurice, that he was going to Los Angeles to kill members of another family, and that when he returned he would finish killing off the Stevenson family. On December 29, 1979, Mr. Gates was arrested in Vallejo, and the gun later determined to be the one that killed Lonnie Stevenson was found on him. *See People v. Gates*, 43 Cal.3d 1168, 1176-78 (1987).

On January 4, 1980, a complaint was filed in Alameda County. It charged Mr. Gates with murder (Cal. Penal Code § 187(a)), accompanied by the robbery/murder special circumstance (§ 190.2 (a)(17)(A)), two counts of robbery (§ 211), assault with a deadly weapon (§ 245(a)), possession of a firearm by an ex-felon (§ 12021), and escape (§ 4532(b)), among other things. He pled not guilty to all the charges. The trial began on March 16, 1981.

At trial, Mr. Gates asserted a claim-of-right defense. He testified about a so-called "Stevenson family forgery ring," purportedly headed by James Stevenson and Donald "Duck" Taylor, and of which, he, Lonnie and Maurice Stevenson, and Melvin Hines were all members. A dispute arose when he did not receive his "big cut" of $25,000 allegedly promised to him. In September 1979, a heated argument between Mr. Gates and other members of the forgery ring led to Mr. Gates being fired upon by Maurice and James Stevenson, which resulted in a gunshot wound to his leg. Thereafter, Mr. Gates learned through intermediaries that he would have to give up his claim to the money or he would be shot. On December 10, he allegedly spoke with Lonnie Stevenson by phone and made arrangements to pick up the money at Jimmy Stevenson's house

at about 3:00 p.m. Mr. Gates went to Jimmy Stevenson's house as had been arranged. As he approached, he saw Maurice and Lonnie outside waxing a car. He allegedly told Maurice and Lonnie that he was there to pick up his money and did not want any trouble, but that he had a gun and could take care of himself. As the three men made their way around the side of the house, Mr. Gates's suspicion was allegedly aroused by some of Maurice and Lonnie's actions, so he patted them down for weapons. After finding none, the three men continued toward the back of the house when Mr. Gates saw Jimmy Stevenson holding a gun. Gunfire erupted. Lonnie and Maurice were shot. Mr. Gates fled. On May 6, 1981, the jury convicted Mr. Gates of all charges and found the special circumstance allegation to be true.

At the penalty phase, the prosecution presented, as evidence in aggravation, evidence of Mr. Gates's convictions for robbery and for two assaults in connection with a 1978 robbery of a McDonald's restaurant, a 1973 conviction of rape, and a 1973 conviction for kidnapping. The prosecution also presented evidence that Mr. Gates was involved in a 1978 assault and robbery of two women at a Los Angeles mortuary, which had resulted in the death of one of the women. (Mr. Gates was later convicted of the Los Angeles mortuary crimes in a separate trial.)

The case in mitigation consisted of testimony by several of Mr. Gates's family members, several apartment neighbors, and a clinical psychologist. His family members described the racially-segregated environment in Belzoni, Mississippi, where he grew up. They testified that he was never in any trouble until an incident at a Western Auto Store when he was approximately 14 to 16 years old; the incident, which apparently involved Mr. Gates, who is African-American, striking a white woman who had struck him first, resulted in him spending six months in jail and becoming a target of police harassment and suspicion for

any problem that arose thereafter. Mr. Gates's mother also testified that she visited him in California in 1973 at a jail hospital after he had been beaten by the police. His neighbors described him as a friendly, sweet, considerate, good-hearted, good-natured person who never got angry and got along well with people. Dr. Paul Berg, a clinical psychologist, testified that Mr. Gates was "an unusually well-adjusted prisoner" and most likely would not present a problem in prison. *See Gates*, 43 Cal.3d at 1193-97. On May 28, 1981, the jury returned a death verdict.

The California Supreme Court affirmed Mr. Gates's conviction and sentence on direct appeal on October 15, 1987. *People v. Gates, supra*, 43 Cal.3d 1168. On May 23, 1988, the United States Supreme Court denied a petition for certiorari. *Gates v. California*, 486 U.S. 1027 (1988).

On August 2, 1988, Mr. Gates's state appellate counsel, Judd Iversen, filed a federal habeas petition alleging that Mr. Gates was mentally incompetent and unable to cooperate with counsel. On August 12, 1988, the Court stayed federal habeas proceedings pending completion of all relevant state court proceedings.[2/]

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2. There was at least one state proceeding pending, and another believed to be pending, when Mr. Iversen first filed a petition in this Court. Both state proceedings were related to Mr. Iversen's belief that Mr. Gates was incompetent, and that, before any proceedings could go forward, a determination of Mr. Gates's competency was required. On July 29, 1988, Mr. Iversen filed a petition for review in the California Supreme Court. The petition for review asked the California Supreme Court to review the state appellate court's decision denying a petition for writ of mandate and request for stay of execution. The California Supreme Court denied the petition for review on September 1, 1988. On July 29, 1988, Mr. Iversen also filed a

This Court appointed current federal habeas counsel, William L. Osterhoudt, on June 28, 1989, to replace Mr. Iversen in these proceedings due to Mr. Gates's beliefs about Mr. Iversen's involvement in an alleged conspiracy against him. On October 12, 1990, Mr. Osterhoudt filed a motion to determine Mr. Gates's competency, alleging that Mr. Gates was incompetent and unable to cooperate rationally with counsel. In 1990, the parties discovered the Alameda County Superior Court's minute order, denying the July 29, 1988, state habeas petition (*see* note 2). Accordingly, Mr. Iversen filed a renewed state habeas petition in Alameda County Superior Court on November 13, 1990, and this Court denied the motion filed by Mr. Osterhoudt without prejudice pending completion of state-court proceedings.

On March 6, 1991, the Alameda County Superior Court denied the renewed state habeas petition on the ground that the California Supreme Court was the appropriate forum. Mr. Iversen then filed a state habeas petition in the California Supreme Court on April 29, 1991. On February 11, 1992, the California Supreme Court denied the petition. Subsequently, on April 20, 1992, counsel renewed in this Court the motion to determine Mr. Gates's competency.

Mr. Gates's competency was litigated over the ensuing two-and-a-half years, at least in part because of his resistance to submit to a psychiatric examination (Second Amended Petition at 20-22). On November 14, 1994, the Court found Mr. Gates mentally incompetent, appointed Colleen Rohan to act as petitioner's next friend, and directed the federal habeas petition

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state habeas petition in Alameda County Superior Court. Apparently unbeknownst to the parties, the Alameda County Superior Court denied the state habeas petition without prejudice in a minute order on August 8, 1988 (Second Amended Petition at 13-14).

to be filed within 120 days. After several extensions of the filing deadline, the first amended federal habeas petition was filed on November 13, 1995.

On February 2, 1996, respondent moved to dismiss the federal petition on the ground that it contained unexhausted claims, or in the alternative, to compel exhaustion. On March 8, 1996, petitioner filed a motion to stay the federal habeas proceedings pending restoration of Mr. Gates's competency. On April 29, 1996, the Court denied petitioner's motion to hold these proceedings in abeyance pending restoration of Mr. Gates's competency. On September 5, 1996, the Court determined which claims in the federal petition had not been exhausted, granted respondent's motion to compel exhaustion and defer filing of the answer, granted petitioner's motion to hold these proceedings in abeyance pending exhaustion, and ordered petitioner to present promptly all unexhausted claims to the California Supreme Court.

Petitioner filed a state habeas petition on April 23, 1997. On January 25, 2000, the case was reassigned to the undersigned. On October 25, 2000, the California Supreme Court denied the state habeas petition. *See In re Oscar Gates,* No. S060778. Petitioner filed a second amended federal habeas petition on December 26, 2000.

In Claim I, petitioner asserts that Mr. Gates "has a constitutional right to competency in the instant proceedings, and [Mr. Gates's] current incompetency requires that these proceedings be stayed," based on the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as the statutory right to federal habeas counsel (Second Amended Petition at 24-30).

The key facts underlying his claim and those relevant to the parties' arguments are not disputed. They are: (1) on November 14, 1994, the Honorable Fern M. Smith, United States District

Judge, "[found] Mr. Gates presently incompetent, in that he presently suffers from a mental disorder that may substantially affect his capacity to cooperate with counsel and proceed with his petition in this court," and the disorder "denies Mr. Gates the capacity to appreciate his position and to make rational choices with respect to these habeas proceedings," (Memorandum and Order: Ruling Re Motion To Determine Mental Competency Of Petitioner at 7);[3/] (2) Judge Smith appointed Colleen M. Rohan, an attorney, "to serve as next friend to Mr. Gates for his federal habeas proceedings before this court," which included the responsibility to "verify the petition," (*id.* at 7-8), and "to act for Mr. Gates and make appropriate decisions on his behalf," (Dec. 28, 1994 Order at 1); and (3) in an order filed on April 29, 1996, Judge Smith denied "[p]etitioner's request to hold these proceedings in abeyance pending restoration of Gates's competency" (Order Re: Status, Scheduling and Exhaustion at 2). It should be added further that, upon inquiry by the Court, neither party now contends that Mr. Gates's mental competence has been restored. Accordingly, with no material fact in dispute, Claim I is ripe for summary

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3. In the order, Judge Smith described the nature of Mr. Gates's beliefs as follows:

> Mr. Gates allegedly believes that both his appointed counsel and this court are part of a state conspiracy to execute him. He claims that this conspiracy is racially motivated and designed to prevent him from disclosing a secret formula made with yellow chili peppers that will cure AIDS. He also claims a right to a trust fund set up by Howard Hughes.
>
> (Memorandum and Order: Ruling Re Motion To Determine Mental Competency Of Petitioner at 6.)

adjudication.

Respondent argues that there is no constitutional right to competency in federal habeas proceedings and that the appointment of a next friend provides adequate protection for Mr. Gates's interests (Ans. Memo. at 16-17). Additionally, respondent contends that the issue about whether Mr. Gates's current mental competency requires a stay of these proceedings "has already been decided against petitioner in prior proceedings and is thus barred by the doctrine of law of the case" (Motion at 3-4).

Petitioner argues that Mr. Gates has a constitutional right to competency in federal habeas proceedings based on the Eighth and Fourteenth Amendments' requirement of heightened due process in capital cases and corollary right to reliable sentencing in capital cases, the general due process requirement that criminal defendants be mentally competent, and the Sixth Amendment right to counsel in habeas proceedings (Second Amended Petition at 24-27). Petitioner further argues that the statutory right to federal habeas counsel also requires the instant proceedings be stayed pending restoration of Mr. Gates's competency (*id.* at 27). The essential thrust of petitioner's argument about the violation of Mr. Gates's constitutional and statutory rights is that, because habeas proceeding involve matters outside of the record about which the condemned inmates is mentally incompetent could lead to the adjudication of a habeas petition that does not contain all potentially meritorious claims and/or all material facts in support of the claims in the petition. (*id.* at 27-28). Petitioner also contends that the law-of-the-case doctrine does not apply in capital habeas proceedings, and assuming arguendo it does apply, it is a discretionary doctrine and several circumstances justify reconsideration of whether the instant proceedings should be stayed pending restoration of Mr. Gates's competence (Opp. at 18-20).

ANALYSIS

Before turning to the merits of Claim I, two preliminary points need to be addressed. First, Claim I is not a true habeas claim in that it does not challenge the legality of any aspect of the state judgment against Mr. Gates, but is related only to the conduct of federal habeas proceedings. *See* 28 U.S.C. 2254(a) ("a district court shall entertain an application for write of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States*") (emphasis added). But, because the issue raised in Claim I potentially has a significant and wide-ranging impact on Mr. Gates's ability to raise all meritorious legal challenges to his conviction and sentence, deciding the instant motion on the ground that Claim I does not directly challenge the legality of Mr. Gates's conviction and sentence is unwarranted. Rather, Claim I shall be construed for what it truly is: a motion to stay federal habeas proceedings pending restoration for Mr. Gates's competence.

As noted, Judge Smith previously denied such a motion in this case. Judge Smith's prior denial lead to the second preliminary point: whether the Court can and should reconsider this issue given Judge Smith's prior denial? Respondent contends that Judge Smith's ruling, pursuant to the law-of-the-case doctrine, bars reconsideration of whether these proceedings must be stayed pending restoration of Mr. Gates's mental competence (Motion at 3-4).

In *City of Los Angeles v. Santa Monica BayKeeper*, 245 F.3d 882, 2001 WL 709267, *1 (9th Cir. June 26, 2001), the Ninth Circuit addressed "the validity of a rescission order issued by the district court purporting to withdraw its previous order certifying an interlocutory appeal, and the effect the rescission order has on our ability to hear this appeal." The district court

issued an order certifying an interlocutory appeal on October 28, 1999, issued on order denying the motion for certification on November 18, 1999, and then, to resolve the inconsistency between the two orders, "issued a final order on December 28, 1999, purporting to withdraw the October 28 certification order." *Ibid.* While the proceedings were ongoing in the district court, the parties seeking interlocutory review filed with the Ninth Circuit, by November 8, 1999, separate petitions for certification of the interlocutory appeal, and the Ninth Circuit approved the petitions on February 29, 2000. *Id.* at *1-2. In *Santa Monica BayKeeper*, the Ninth Circuit concluded that the district court had properly rescinded the October 28 certification order and the rescission order divested it of jurisdiction to hear the interlocutory appeal. *Id.* at *2. The Ninth Circuit rejected the argument that the district court's rescission order violated the law of the case, explaining:

> The law of the case doctrine originated in the courts as a means of ensuring the efficient operation of court affairs. Specifically, this doctrine was designed to further the "principle that in order to maintain consistency during course of a single lawsuit, reconsideration of legal questions previously decided should be avoided." While courts are generally urged to adhere to this doctrine, it is "not an inexorable command." That is, the doctrine "is discretionary, not mandatory" and in no way is "a limit on [a court's] power." [¶] Here the law of the case doctrine is wholly inapposite. *The doctrine simple does not impinge upon a district court's power to reconsider its own interlocutory order provided that the district court has not been divested of jurisdiction over the order.*

Id. at *6 (citations omitted) (*citing with approval, United States v. Houser,* 804 F.2d 565, 568 (9th Cir. 1986) ("All rulings of a

trial court are subject revisions at the any time before the entry of judgment. A trial court may not, however, reconsider a question decided by an appellate court").

In the instant case, since there has been no final judgment nor has Claim I been decided by an appellate court, the law of the case does not prevent reconsideration of the issue raised in Claim I. Moreover, even if the law of the case applied generally, it is a discretionary doctrine and an intervening change in the law is one of the identified basis under which a district court can depart from that doctrine. *See United States v. Alexander,* 106 F.3d 874, 876 (9th Cir. 1997); *Thomas v. Bible,* 983 F.2d 152, 154-55 (9th Cir. 1993). Here, Judge Smith ruled on petitioner's request for a stay pending restoration of Mr. Gates's competency in April 1996. At that time, the principal authority that creates a substantial ground for difference of opinion on the appropriate resolution of Claim I, *Calderon v. United States District Court* (*"Kelly V"*), 163 F.3d 530 (9th Cir 1998) (en banc), had not yet been decided. As such, the issuance of *Kelly V* subsequent to Judge Smith's ruling warrants reconsideration of the issue raised in Claim I.

A. Claim 1

The issue raised in Claim I is straightforward: does Mr. Gates's current mental incompetency, in particular, his inability to consult with or assist federal habeas counsel, require these proceeding to be stayed until his competence is restored? Petitioner argues that a stay of federal habeas proceedings is required because habeas proceedings involve matters outside of the record about which the condemned inmate would have unique knowledge, and so proceeding while the condemned inmate is mentally incompetent could lead to adjudication of a habeas petition that does not contain all potentially meritorious claims and/or all material facts in support of the claims in the petition (Second Amended Petition at 27-28). There is no

authority directly addressing the precise issue raised in Claim I. The greater weight of relevant authority indicates, however, that when a federal habeas petitioner is found to be mentally incompetent during federal habeas proceedings that appropriate remedy is to appoint a next friend and proceed; it is not to stay the proceedings until the inmate's competence is restored.

Review of the federal habeas statute, the cases which the habeas statue codified, and cases involving condemned inmates seeking to waive habeas or appellate review strongly indicates that when a condemned inmate is found to be mentally incompetent during federal habeas proceedings the appropriate course of action is to appoint a next friend to pursue habeas relief on the inmate's behalf and proceed. Section 2242 of Title 28 of the United States Code states, "[a]pplication for a write of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or *by someone acting in his behalf*" (emphasis added). When congress added the italicized language to the federal habeas statue in 1948, the effect of which was to codify the doctrine of next-friend standing in federal habeas proceedings, "the revisers noted that the change 'followed the actual practice of the courts.'" *Whitmore v. Arkansas*, 495 U.S. 149, 162-63, n.3. (1990) (quoting Revisers' Notes to 28 U.S.C. § 2242 (1982 ed.)). That "actual practice" was to allow a next friend to pursue federal habeas relief on behalf of a detained person when the detained person was unable to do so on his or her won, *see Collins v. Traeger*, 27 F.2d 842, 843 (9th Cir. 1928) (allowing next friend to pursue habeas relief on behalf of detained person), and mental incapacity of the detained person was recognized to be a ground where appointment of a next friend was appropriate. *See United States, ex. rel. Bryant v. Houston*, 273 F. 915, 916-17 (2nd Cir. 1921) (noting that mental incapacity of a prisoner is one situation where appointment of a next friend is appropriate, but dismissing putative next-friend's petition because she failed to set forth reason why inmate was unable to

prosecute petition on his own); *United States, ex. rel. Funaro v. Watchorn,* 164 F.3d 152, 153 (S.D.N.Y. 1908) (noting that lack of time, infancy, or incompetency provide basis for allowing a next friend to pursue habeas relief on behalf of detained person). Thus, the federal habeas statute, and the cases on which the language in Section 2242 is based, contemplate that there may be occasions where the detained person is mentally incompetent to pursue habeas relief and that the statute provides for that situation by allowing a next friend to be appointed and pursue relief on behalf of the detained person.

More recent cases addressing the situation where a condemned inmate seeks to waive appellate and/or collateral review similarly reflect the understanding that the appropriate remedy for a mentally incompetent inmate during federal habeas proceedings is to appoint a next friend to pursue habeas relief. In *Whitmore v. Arkansas,* 495 U.S. 149 (1989), Ronald Simmons sought to waive all further appellate proceedings following his conviction and death sentence for murdering 14 family members, and state court found him mentally competent to make the waiver and that the waiver was knowing and intelligent. *Whitmore,* 495 U.S. at 152-153. Roughly a month before Simmons' scheduled execution, a fellow death row inmate (Whitmore) sought to intervene as a next friend, prevent Simmons' execution and pursue appellate relief on Simmons' behalf. *Id.* at 153-54, 161-62. The Supreme Court explained:

> A "next friend" does not himself become a party to the habeas corpus action in which the participates, but simple *pursues the cause on behalf of the detained person*, who remains the real party in interest. . . . Decisions applying the habeas corpus statue had adhered to at least two firmly rotted prerequisites for "next friend" standing. First, a "next friend" must proved an adequate explanation — such as inaccessibility, *mental incompetence,* or other

> disability — why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate.

Id. at 163-64 (emphasis added) (citations omitted). The Supreme Court concluded that Whitmore was unable to establish next-friend standing because an evidentiary hearing in state court showed that Simmons was mentally competent and had given a knowing, intelligent, and voluntary waiver of his right to appeal. *Id.* at 165-66.

Vargas v. Lambert, 159 F.3d 1161 (9th Cir. 1998), involved a similar fact pattern. Following his conviction and death sentence, Jeremy Sagastequi "request[ed] to waive his rights to appeal and to the assistance of counsel for any review of his sentence." *Vargas*, 159 F.3d at 1163. Less than a month before his scheduled execution, Sagastequi's mother, Katie Varga, moved to intervene as her son's next friend and to file a state habeas petition on his behalf, and then following denial of that motion in state court, filed a similar motion in federal district court, which was also denied. *Id.* at 1165. The Ninth Circuit reversed, however, holding that Vargas has presented sufficient, meaningful evidence that since the last competency hearing Sagastegui's mental functioning may have had deteriorated significantly such that he may no longer be mentally competent to waive review, and remanded the matter to the state court to conduct an evidentiary hearing to resolve Sagastegui's competence. *Id.* at 1169-71. Significantly, the Ninth Circuit said that if, following the evidentiary hearing, Sagastegui was found presently incompetent, "Vargas [would] have to standing to file habeas proceedings as his next friend." *Id.* at 1171. It did not suggest that a stay of federal habeas proceedings pending restoration of Sagastegui's competency would be required. *Ibid.*

In sum, *Whitmore* and *Vargas* contemplate that the remedy for a condemned inmate who is or becomes mentally incompetent during habeas proceedings is to appoint a next friend and that the next friend" pursues the cause on behalf of the detained person." *Whitmore,* 495 U.S. at 163. Neither case suggested that a finding of mental incompetency during habeas proceedings would require or warrant a stay of federal habeas proceedings.

Not only do the foregoing authorities indicate that appointment of a next friend to pursue habeas relief is contemplated as the appropriate response when the condemned inmate is or becomes mentally incompetent during federal habeas proceedings, but staying federal habeas proceedings because of a habeas petitioner's inability to communicate with counsel is in tension with *Ford v. Wainwright*, 477 U.S. 399 (1986), and the role of federal habeas review generally.

In *Ford,* Supreme Court held that the Eighth Amendment prohibits execution of the insane. *Ford*, 477 U.S. at 401. To be competent to be executed, the condemned inmate must be aware of the punishment he or she is about to suffer and the reason why. *Id.* at 422-23 (Powell, J., concurring): *see also Massie v. Woodford*, 244 F.3d 1192, 1195 n.1 (9th Cir 2001) (citing Justice Powell's concurring opinion as establishing standard for competency to be executed). In determining the appropriate standard for competency to be executed, Justice Powell considered the various rationales offered at common law to explain the "ancient prohibition on execution of the insane." *Id.* at 419. he noted that one suggested rationale was "that the prohibition against executing the insane was justified as a way of preserving the defendant's ability to make arguments on his own behalf" and possibly avoid execution, but concluded that his justification "has slight merit today." *Id.* at 419-20. He explained:

> Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal review. Throughout this process, the defendant has access to counsel, by constitutional right at trial, and by employment or appointment at other Stages of the process whenever the defendant raises substantial claims. . . . These guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free.

Id. at 420.[4] Justice Powell further stated, "a standard [for competency to be executed] that focused on the defendant's ability to assist in his defense would give to little weight to the State's interest in finality, since it implies a constitutional right to raise new challenges to one's criminal conviction until the sentence has run its course. Such an implication is false[.]" *Id.* at 421.

Petitioner's contention that his current inability to assist federal habeas counsel requires federal habeas proceedings to be stayed pending restoration of his competence, if ever, raises the prospect that Mr. Gates, without ever demonstrating constitutional error at his trial and even though he may be mentally competent to be executed, could effectively prevent execution of the presumptively-valid judgment against him. Admittedly, *Ford* involved a different factual scenario than

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4. Justice Powell added that, "in cases tried at common law execution often followed fairly quickly after trial, so that incompetence at the time of execution was linked as a practical matter with incompetence at the trial itself." *Ford,* 477 U.S. at 420-21.

these proceedings in that questions about Ford's mental functioning did not arise until after he had fully litigated his federal habeas petition. Nonetheless, the prospect raised by petitioner's contention, at minimum, places it in tension with the holding in *Ford* and it's rejection of "the ability to assist counsel" as part of the standard to be executed.

Moreover, petitioner's argument in Claim I appears to reflect an attempt to import trial-level constitutional safeguards — such as, the right to effective assistance of counsel and competency to stand trial — into federal habeas proceedings. The role of federal habeas review is not to re-try the original trial, however, but instead is limited to review for federal constitutional error. As the United States Supreme Court has explained:

> When the process of direct review — which, if a federal question is involved, includes the right to petition this Court for writ of certiorari — comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error.

Barefoot v. Estelle, 463 U.S. 880, 886-87 (1983). Ordinarily, the best evidence of any constitutional error at trial will be the trial record itself. Thus, given the more limited review of

federal habeas, and the fact that resolution of many claims will not necessitate any input from the condemned inmate, there is no justification for staying federal habeas proceeding in their entirety simply because the inmate cannot communicate with federal habeas counsel and possibly provide information that might strengthen some of the claims in the petition or give rise to other claims.

The Court invited a submission from petitioner setting forth the claims where Mr. Gates's input would be material and describing the type of information Mr. Gates might be available to provide. On August 6, 2001, petitioner submitted such information. Without revealing the content of that submission, it can be described as being fairly general. Accordingly, at the present time, and on the present record, the Court finds that a stay of these proceedings is not warranted.

B. 28 U.S.C. 1292(b)

A recent statement by the Ninth Circuit in an en banc decision casts some doubt on the foregoing conclusion. In *Calderon v. United States District Court* (*"Kelly V"*), 163 F.3d 530 (9th Cir. 1998) (en banc), one of the issues before the Ninth Circuit was whether Kelly's alleged mental incompetency justified equitable tolling of the statue of limitations for filing a federal habeas petition. The court concluded, "when a putative habeas petitioner's mental competency is at issue, and the record discloses a genuine basis for concern, it is appropriate to toll the AEDPA's time bar until a reasonable period after the district court makes a competency determination." *Kelly V,* 163 F.3d at 541. The Ninth Circuit reasoned:

> Under 21 U.S.C. §848(q)(4)(B), Kelly has a statutory right to counsel in his federal habeas proceeding. That right contemplated effective communication

> between lawyer and client. A putative habeas petitioner's mental incompetency – a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control – renders the petitioner unable to assist his attorney in the preparation of a habeas petition. Such a condition could eviscerate the statutory right to counsel. Where, as here, there is a threshold showing of mental incompetency, a sufficient showing has been made for equitably tolling the statue of limitations.

Ibid.; cf. McFarland v. Scott, 512 U.S. 849, 855059 (1994) (holding that appointment of federal habeas counsel, pursuant to 21 U.S.C. 848(q)(4)(B), prior to filing of the federal petition is necessary to give the statue any meaning as a practical manner because the complex nature of capital-habeas jurisprudence, including the consequences for failing to include all possible claims in the first petition, makes it unlikely that petitioner could file successful petitions for collateral relief without the assistance of counsel.)

In addition, while ordinarily the trial record will be sufficient to resolve federal habeas claims, there could be a case where there is a strong showing of potential constitutional error and resolution of the claim or claims would turn on facts and circumstances known only to the inmate. In such a situation, the inmate's ability to consult with counsel could be crucial, and proceeding on the claim or claims while the inmate is mentally unable to provide the crucial information would seem to diminish the limited, but "particularly important role [federal habeas corpus] play[s] in promoting fundamental fairness in the imposition of the death penalty." *McFarland,* 512 U.S. at 859.

Petitioner further contends that the actions of the United States Supreme Court in *Rees v. Peyton,* 384 U.S. 312 (1966) (*"Rees I"*), *Rees v. Peyton,* 386 U.S. 989 (1967) (*"Rees II"*),

Rees v. Peyton, 516 U.S. 222 (1995) (*"Rees III"*), and *Anderson v. Kentucky,* 376 U.S. 940 (1964), demonstrate that "when a petitioner has been judged mentally incompetent during habeas proceedings involving review of a capital state judgment, the case must be stayed, pending restoration of the petitioner's competency" (Opp. at 13).

In *Anderson,* following affirmance of his conviction and death sentence by the Kentucky Court of Appeals, and the filing a petition for certiorari review, *see Anderson v. Kentucky,* 371 U.S. 886 (1962), the case was continued indefinitely, allegedly due to Anderson's mental incompetence, "[b]y joint agreement of the parties." *Anderson v. Kentucky,* 376 U.S. 940, 940 (1964).

In *Rees*, approximately one month after filing a petition for certiorari review of the denial of his federal habeas petition by the United States Court of Appeals for the Fourth Circuit, "Rees directed his counsel to withdraw the petition and forgo any further legal proceedings." *Rees*, 384 U.S. at 313. Rees's counsel refused because he doubted Rees's mental competence to make that decision. *Ibid.* The Supreme Court stated that before it could determine whether Rees would be allowed to withdraw his petition the question of Rees's mental competency had to be resolved and os it remanded the case to the district court, though retaining jurisdiction, for the district court to conduct an evidentiary hearing on Rees's mental competence and report back. *Id.* at 313-14. There are no reported decisions as to what occurred following this remand except for two brief Supreme Court orders. In *Rees II,* the Supreme Court issued an order stating, "[t]his case is held without action on the petition until further order of the Court." *Rees II,* 386 U.S. at 989. Then, nearly 30 years later, and purportedly in response to Rees's death, (Second Amended Petition at 26, n. 18), the Supreme Court issued an order stating, "[p]etition for writ of certiorari to the United States Court of Appeals for the Fourth

Circuit dismissed." *Rees III,* 516 U.S. at 222.

Neither *Kelly V* nor the series of orders in *Anderson* and *Rees* resolve the present issue. Because *Kelly V* involved the issue of equitable tolling of the statute of limitations it is not controlling authority for the issue raised in Claim I. Notably, as well, the Ninth Circuit did not suggest that a finding of mental incompetency by the district court on remand would require or warrant a stay of the proceedings. *See Kelly V*, 163 F. 3d at 541. Unlike *Anderson,* where the case was stayed by joint agreement of the parties, respondent does not agree to stay of these proceedings. And, while the Supreme Court in *Rees* apparently did stay the proceedings indefinitely following a determination that Rees was mentally incompetent, the order doing so does not explain the reasoning behind the action. Nonetheless, the Ninth Circuit's reasoning in *Kelly V,* as well the possibility that a situation could arise where a condemned inmate's input would be crucial in resolving a claim or claims, provide a substantial ground for a difference of opinion over this Court's resolution of Claim I.

Additionally, the issue raised in Claim I concerning Mr. Gates's inability to consult with counsel is a controlling question of law, in that, while collateral to the merits of the federal petition, it has the potential to impact significantly Mr. Gates's ability to demonstrate federal constitutional error at trial. As discussed above, proceeding while petitioner is unable to consult with counsel could lead to the adjudication of federal petition that does not include all material facts or meritorious claims that might entitle petitioner to relief, and spare him from execution.

Moreover, an immediate appeal from the instant order may materially advance the ultimate termination of the litigation before this Court because the court of appeals could hold that Mr. Gates's inability to assist his federal habeas counsel

requires these proceedings to be stayed pending restoration of his competence. Should Mr. Gates never regain competency, such an order by the court of appeals would effectively terminate the litigation in this Court and avoid needless litigation and use of resources.

For instance, today, the Court issued a lengthy order addressing respondent's affirmative defenses of procedural default and the non-retroactivity rule of *Teague v. Lane,* 489 U.S. 288 (1989). In terms of the litigation remaining in this case, that order is jut the tip of the iceberg. Indeed, despite that lengthy order, supplemental briefing on the affirmative defenses is needed, and has been ordered, in order to resolve them completely. Beyond that, petitioner has indicated that he intends to move for an evidentiary hearing and for authorization to engage in discovery. If either, or both, of those request are warranted, additional time and resources will be expended in preparing for the hearing, litigating discovery and evidentiary matters related to the hearing, and in holding the hearing. Regardless of whatever any evidentiary hearing is held or any discovery authorized, there presumably will be extensive briefing on the merits of whichever of the 34 claims for relief survive respondent's affirmative defenses. Because Mr. Gates is indigent, all the hours his attorneys spend litigating this case, and any investigative and/or expert services that are reasonably necessary for that litigation, are paid for with funds provided by the Criminal Justice Act. In the end, all the time and money expended litigating this case could be for naught if, following resolution of the petition, the court of appeals holds that this Court should have stayed these proceedings pending restoration of Mr. Gates's competence, a circumstance whose occurrence is not for certain.

Accordingly, although the greater weight of relevant authority indicates that a stay of federal habeas proceedings is not required, this Court, for the reasons explained above, finds

this order to be appropriate for certification for interlocutory review pursuant to Section 1292(b) of Title 28 of the United States Code.

CONCLUSION

For the reasons explained above, **IT IS HEREBY ORDERED** that respondent's motion for summary judgment on Claim I is **GRANTED.** The Court certifies, however, that this order "involves a controlling of question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. 1291(b).

IT IS SO ORDERED.

Dated: August 23, 2001.

WILLIAM ALSUP
United States District Judge